ROBERT SIM TECK HOCK

v.

KOPERASI WANITA SARAWAK BHD & ANOR

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[ORIGINATING SUMMONS NO: 24-6-2000 (MR)]
27 OCTOBER 2000

LAND LAW: *Restraints on dealings - Caveats - Caveatable interest - Whether plaintiff had caveatable interest - Land Code (Cap. 81) (Sarawak), s. 173*

LAND LAW: *Restraints on dealings - Caveats - Caveatable interest - Whether there were serious questions to be tried - Whether caveat should remain on balance of convenience*

LAND LAW: *Restraints on dealings - Caveats - Holder of power of attorney applying to remove caveat - Whether entitled to do so - Land Code (Cap. 81) (Sarawak), ss. 177, 178*

The first defendant, Koperasi Wanita Sarawak Berhad made a formal application to the relevant authority of the State for the alienation of a certain piece of land ('the land'). Pursuant to the application, the first defendant purportedly created a trust deed declaring that it made the said application in trust for the parties stipulated therein. By the trust deed the first defendant also gave the undertaking that upon alienation of the said land, it will at the request of the beneficiaries thereof, transfer the said land to such persons as the said beneficiaries may direct or appoint, one of such beneficiaries being the plaintiff in this application.

The first defendant was alienated the piece of land and subsequently executed a memorandum of agreement ('the development agreement') with Unibor to develop the said land followed by a grant of a power of attorney in favour of Unibor.

The plaintiff lodged a caveat on the land on 1 October 1993 to protect his interest therein. Upon the application of the second defendant to enter a memorandum of charge in respect of the said land, the registrar issued to the plaintiff under s. 178 of the Land Code (Cap. 81) (Sarawak) a notice dated 14 November 1999 to the effect that the caveat shall be deemed to have lapsed after the expiry of three months from the date thereof unless further extended or otherwise ordered by the court.

The plaintiff now applies to have the caveat remain on the land.

The issues for consideration were: (i) whether the plaintiff had succeeded in satisfying the court that he is a person who is entitled to lodge a caveat under s. 173 of the Land Code (Cap. 81) (Sarawak); (ii) whether the person who had applied to remove the caveat was entitled to apply for such removal.

Held:

[1] To entitle his claim to remain in force on an application for its removal by a caveatee, the caveator must satisfy the court that his claim to an interest in the land does raise a serious question to be tried, and that the balance of convenience is in favour of allowing the caveat to remain.

[2] A power of attorney does not give an interest in land and it is not truly a registered instrument conferring an estate or interest.

[2a] The objection to the caveat remaining on the register did not come from the first defendant itself but from Unibor, the holder of the power of attorney given by the first defendant pursuant to a development agreement entered between the first defendant and Unibor. The affidavits opposing the application were also not made on behalf of the first defendant but were made for and on behalf of Unibor as the holder of the power of attorney thereof. It necessarily follows that Unibor is not one of such persons who can apply for the removal of a caveat under s. 177 of the Land Code (Cap. 81) (Sarawak), or to oppose an application for an order under s. 178 thereof pursuant to notice for removal thereunder.

[Plaintiff's application allowed conditionally.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd v. Chang Ching Chuen [1995] 2 MLJ 42 ***(dist)***
Butler v. Fairclough & Anor [1917] 23 CLR 78 ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Holt v. Anchorage Management Ltd [1987] 1 NZLR 108 ***(refd)***
KK Kumaran v. TS Sambanthamurthi [1997] 2 CLJ Supp 26 ***(refd)***
Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20 ***(refd)***
Low Chan Hian v. Kelab Golf Diraja Selangor [1995] 3 MLJ 1 ***(refd)***
Macon Engineering Sdn Bhd v. Goh Hooi Yin [1976] 2 MLJ 53 ***(foll)***
Majlis Daerah Dungun v. Tenaga Nasional Bhd [1999] 8 CLJ 337 ***(refd)***
Re Ellenborough [1903] 1 Ch 697 ***(refd)***
Re Northcliffe: Arnholz v. Hudson [1925] 1 Ch 651 ***(refd)***
Tan Suan Heoh v. Lim Teck Meng & Ors [1987] 2 MLJ 466 ***(refd)***
Wee Tiang Peck v. Teoh Poh Tin [1955] 1 MLJ 446 ***(refd)***
Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals [1994] 3 CLJ 21 ***(refd)***
Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor [1998] 1 CLJ 395 ***(refd)***

Legislation referred to:
National Land Code, s. 327
Rules of the High Court 1980, O. 32 r. 13(2)(b)
Land Code (Cap 81) (Sarawak), ss. 173, 177, 178

Other source(s) referred to:
Baalman, *The Torren System in New South Wales,* 2nd edn 1974, p 300

For the plaintiff - Wong Siong Tung; M/s Tan, Yap & Tang Advocs
For the defendants - Victor Wong; M/s Victor Wong & Chiew Advocs

Reported by Mariette Peters-Goh

JUDGMENT

Sulaiman Daud JC:

This is an application by the plaintiff under s. 178 of the Land Code (Cap. 81) ("the Land Code") for an order that Caveat Instrument No. L7514/1993 lodged by the plaintiff on 1 October 1993 shall not lapse and be removed and to allow the same to remain on the land register until further order.

The application is supported by four affidavits of Robert Sim Teck Hock affirmed on 23 December 1999, 24 January 2000, 28 January 2000 and 2 May 2000 respectively (collectively referred to as "RS affidavit"). Two affidavits were filed to oppose the application, that is the affidavit of Tan Sri Dato Paduka (Dr) Ting Pek Khing affirmed on 26 January 2000 ("TS affidavit") and the affidavit of Tong Chee Boh affirmed on 26 January 2000 ("TCB affidavit").

This application came before me for disposal on 26 July 2000 by which date all the aforesaid affidavits have been filed. After hearing the submission of the learned counsel for the plaintiff I proceeded to hear the submission of the learned counsel for the defendants. Unable to complete, the matter was adjourned twice before the final hearing date on 15 September 2000 for continuation of submission. Meanwhile on 18 August 2000 the defendants filed in two further affidavits in reply affirmed on 17 August 2000 by Tan Sri Dato Paduka (Dr) Ting Pek King and Ting Ing Chew respectively ("the disputed affidavits"). The learned counsel for the plaintiff objected to the tendering of such affidavits as it was an attempt to introduce new evidence and were filed outside the fourteen days period as prescribed under O. 32 r. 13(2)(b) of the RHC. To support his objection he referred to the case of *Yian Sdn. Bhd. v. Datuk Bandar Kuala Lumpur & Anor* [1998] 1 CLJ 395 where the court expunged from the record an affidavit which sought to introduce fresh evidence, filed

in when the applicant was nearing the completion of its submission in reply. The learned counsel for the defendants on the other hand submitted that the two affidavits were not intended to introduce new evidence but were made in reply to the plaintiff's earlier affidavits and that O. 32 r. 13(2)(b) which requires an affidavit in reply to be made within fourteen days from the receipt of the affidavit to be replied is not applicable. In support thereof he referred to the case of *Low Chan Hian v. Kelab Golf Diraja Selangor* [1995] 3 MLJ 1 where it was held that O. 32 r. 13(2)(b) is a general provision applying to affidavits used in summon in chambers only and not applicable to originating summons. Upon perusal of the two affidavits I am satisfied that the two disputed affidavits were made in reply to the plaintiff's subsequent affidavits and not the affidavit in support of the originating motion itself and as such the rule imposing the fourteen days limit under the said O. 32 r. 13(2)(b) is not applicable (see *Majlis Daerah Dungun v. Tenaga Nasional Bhd.* [1999] 8 CLJ 337). However since those affidavits were filed at such a late stage of the proceedings after the learned counsel for the plaintiff had completed his submission and the counsel for the defendants had proceeded with his submission, I did not allow the two affidavits to be used and expunged the same from the record of this proceedings. However if I am wrong in so deciding, nothing contained in the disputed affidavits will have any effect on my decision in the instant case.

Briefly the facts of the case are as follows. The first defendant, Koperasi Wanita Sarawak Berhad by a letter dated 23 November 1979 made a formal application to the relevant authority of the state for the alienation of certain piece of land in the Miri Concession Land District. Pursuant to the application and before the alienation of the said land, the first defendant had on 8 June 1981 purportedly created a trust deed (see exh. "STH1" of RS affidavit) declaring that it makes the said application in trust for the parties stipulated therein. By the trust deed the first defendant also gave the undertaking that upon the alienation of the said land it will, at the request of the beneficiaries thereof, transfer the said land to such person as the said beneficiaries may direct or appoint. One of such beneficiaries is Robert Sim Teck Hock, the plaintiff in this application, who is being allocated 15% proportionate shares in the trust deed. Subsequently the plaintiff increased his proportionate share in the trust deed to 25% by acquiring the interest of two other beneficiaries therein.

Pursuant to the application referred to in the trust deed, the first defendant was alienated a piece of land known as Lot No. 251, Block 12, Miri Concession Land District which was registered in its name in July 1984. On 15 November 1984 the first defendant executed a memorandum of

agreement with Unibor Sdn. Bhd. ("Unibor") to develop the said land ("the development agreement") followed by a grant of a power of attorney in favour of Unibor. By virtue of the development agreement Unibor lodged a caveat on the said land on 10 November 1987 and registered the power of attorney in respect thereof on the following day. The plaintiff in reliance to the trust deed and the deed of assignment as aforesaid lodged a caveat on the said land on 1 October 1993 to protect his interest therein. Subsequently in response to the plaintiff request for the transfer of his undivided share in the said land under the trust deed, the first defendant by a letter dated 4 February 2000 signed by its chairperson promise and undertake to abide by the terms of the trust deed and to arrange with the Land and Survey Department Miri for such transfer to be effected to the plaintiff.

Upon the application of the second defendant to enter a memorandum of charge in respect of the said land, the registrar of Land and Survey Department, Miri issued to the plaintiff under s. 178 of the Land Code a notice dated 14 November 1999 to the effect that the said caveat shall be deemed to have lapsed after the expiry of three months from the date thereof unless further extended or otherwise ordered by the court.

One of the principles to be followed in relation to an application for an order to extend the period of a caveat under s. 178 of the Land Code is that as adopted in the case of *Macon Engineering Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53. Based on the principle laid down in that case, in its application to the Land Code, the question for determination in order to support the caveat to remain in force is whether the plaintiff has succeeded in satisfying the court that he is a person who is entitled to lodge a caveat under s. 173 of the Land Code. The relevant question which the court should address itself to is: is the plaintiff a person who claims to be entitled to or to be beneficially interested in any land, estate or interest under the Land Code by virtue of, among others, any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever? The factual matrix of the claim to be a person or body within the purview of para. (a) of s. 173 must be minutely considered by evidence to establish that the claim is not frivolous and vexatious (see also *Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd.* [1992] 1 CLJ 20).

The other approach to deal with the claim by a caveator that he has a right to lodge a caveat is to be found in the well known Privy Council case of *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212. The general principle that can be drawn from the observations made in that case is that to entitle his caveat to remain in force on an application for its removal

by a caveatee, the caveator must satisfy the court that his claim to an interest in the land does raise a serious question to be tried, and secondly that the balance of convenience is in favour of allowing the caveat to remain (*Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd*).

In the instant case in order to determine whether the plaintiff is a person who is beneficially interested in the said land, the questions to be asked are firstly whether the trust deed dated 18 Jun 1981 is valid and enforceable in that it makes a declaration of trust in respect of future property, and secondly if answered in the negative, whether the subsequent act or confirmation by the first defendant to abide by the terms of the trust deed on the plaintiff rendered the previous trust instrument valid and enforceable.

The learned counsel for the plaintiff conceded that from authorities it is clear that a trust deed which relates to a declaration of trust in respect of property to be acquired in the future is not valid and enforceable. However he submitted that the subsequent confirmation thereof by the first defendant, as settlor, that it will abide by the term of the trust deed had rendered the said trust deed valid and enforceable in favour of the plaintiff as beneficiary. In support thereof the learned counsel referred to the case of *Re Northcliffe: Arnholz v. Hudson* [1925] 1 Ch 651, where in that case the settlor entered into a voluntary covenant in an indenture under seal to settle upon trust any freehold properties that he should afterward acquire. The settlor afterwards acquired freehold property that came within the covenant. The settlor by his will which was executed after the property had been acquired by him confirmed the settlement. It was held that by confirming the settlement in the will, the testator had declared in his lifetime that the trustees of the settlement were entitled to the said properties and that he (the testator) held them on the trusts of the settlement.

The learned council for the plaintiff also referred to the case of *KK Kumaran v. TS Sambanthamurthi* [1997] 2 CLJ Supp 26. In that case the defendant is the registered owner of a piece of land in which the plaintiff claims to have an undivided share of 15/325. The issue for determination in that case is whether it is expedient for the court to make an order for the sale of the land to realise the plaintiff's claim for the said undivided shares. It was held that although the land was registered in the name of the defendant as the sole proprietor, he did not deny the plaintiff's right to a share in the land, thus making the defendant a trustee who was accountable to the plaintiff's 15/325 undivided share and as such the court find it expedient to make an order for such sale. The learned counsel for the plaintiff submitted that the trust deed in the instant case would in the

like manner have been rendered valid and enforceable by the subsequent act and conduct of the first defendant in continuing to recognise the plaintiff's interest and claim in the said land after its alienation. It is evident from the affidavits of the plaintiff that the first defendant continues to recognise the plaintiff's equitable interest in the said land where he was called to attend several meetings with the chairperson and other officers of the first defendant to discuss the development of the said land.

The learned counsel for the defendants on the other hand submitted that the said trust deed is void and ineffective as it purported to grant future property upon trust. He also contended that when the first defendant purportedly confirmed the trust deed it had already entered into the development agreement with Unibor and by reason thereof the act of the first defendant in confirming the same would be in breach of trust and without effect. The learned counsel also contended that the plaintiff is a volunteer as it is clear from the purported trust deed that there is no consideration whatsoever for the creation of the trust. He referred to the case of *Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals* [1994] 3 CLJ 21 where it was held that a court of equity would not render assistance to a volunteer in the case of an incompletely constituted trust where the trust property has not been finally and completely vested in the trustee. The learned counsel also referred to the case of *Re Ellenborough* [1903] 1 Ch 697 where it was also held that a voluntary assignment of an expectancy, even though under seal, would not be enforced by a court of equity. The question as to whether the plaintiff is a volunteer or otherwise was never raised in the affidavits of both parties and in the absence of any evidence to that effect it is my view that such issue cannot be properly determined by the wording of the trust deed alone.

The learned counsel for the defendants also submitted that the purported trust deed is void and unenforceable as being a scheme to defraud the public administration and is against public interest. He further submitted that the entities named as beneficiaries in the purported trust deed have used the first defendant as a front to obtain the alienation of the said land for personal benefit and as such it is intended to hoodwink the State Government to alienate the said land for the benefit of the said entities and individuals who are otherwise not entitled to the alienation thereof. To support his argument the learned counsel relied on the case of *Aik Ming (M) Sdn Bhd v. Chang Ching Chuen* [1995] 2 MLJ 42. In that case the defendants transferred 11,658 shares of a company to the second plaintiff to be held in trust for the third and fourth defendants. The said shares were never intended by the defendants to be the second plaintiff's property and such transfer was made for the sole purpose of facilitating her appointment

as one of the two Malaysian directors needed by the company. It was held that the deed of trust and power of attorney were tainted with illegality and therefore void and worthless as it was intended by the defendants to mislead the Registrar of Companies into believing, on the face of the statutory document lodged with him, that the second plaintiff was the true beneficial owner of the shares in question and a director of the company.

In my view the facts in the *Aik Ming*'s case can be distinguished from that of the instant case. The said trust deed was never intended to misled the State Government to alienate the said land to the first defendant as it is not contrary to law for the first defendant to hold the property in trust for any other person such as the plaintiff. If at all there exists any scheme or device to perpetrate fraud upon the state government it is the act of the first defendant itself in not disclosing to the relevant authorities that the said application was made for the benefit of the persons named in the trust deed. Be that as it may I am also of the view that it is also not proper and just at this stage that the question of nullity, illegality or otherwise of the trust deed to be decided in this application by affidavits. What we need to look now is whether there are any merits in the plaintiff's contention for the purpose of establishing that it has any beneficial interest in the said land. To do this we have to ask the further question whether the claim made by the plaintiff has raised a serious question to be tried (see *Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn Bhd*). From the facts of the case and the authorities cited by both counsels I am satisfied that upon undisputed evidence, there are such serious questions, that is to say whether the plaintiff has a beneficial interest on the land by the subsequent affirmation of the trust deed or alternatively by the existence of a resulting trust through continuous recognition by the first defendant of the plaintiff's right on the said land.

The next question is whether the balance of convenience is in favour of allowing the caveat to remain. In *Eng Mee Yong*'s case Lord Diplock in determining the balance of convenience in respect of an application for the removal of a caveat under s. 327 of the National Land Code (the equivalent of s. 177 of the Land Code) observed at p. 215 as follows:

> ... so too in an application by the caveator under section 327 for the removal of a caveat, once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious matter to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges to be tried.

In my view the aforesaid observation may in the like manner be applied in determining the balance of convenience in respect of an application for an order under s. 178 of the Land Code. Having satisfied that the plaintiff's case has raised a serious question to be tried, then it is my finding that the balance of convenience, in the absence of any special circumstances, would be in favour of leaving the caveat in existence until the trial of the action (see also *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd*). Even if the plaintiff has not commenced any proceedings for the determination of the legality of and his right under the trust deed the court may, so as to preserve the *status quo*, order the plaintiff to commence such proceedings within such period as may be prescribed by the court (see *Tan Suan Heoh v. Lim Teck Meng & Ors* [1987] 2 MLJ 466).

The other issue for determination is whether the caveat ought to be removed on the ground of inordinate delay on the part of the plaintiff to commence proceedings to exert his right over the land. The learned counsel for the defendants submitted that such a delay shall be sufficient ground for refusing an application for an extension of the said caveat. It is not disputed that the plaintiff has not, after a lapse of more than sixteen years from the date of the alienation of the said land, commence any proceedings to exert his right over the said land. In reply the learned counsel for the plaintiff argued that the purpose for which the caveat was entered in 1993 was not for the purpose of taking legal action against the registered owner of the land but merely to give a permanent protection to his equitable interest in the said land. The learned counsel further contended that there is no duty on the part of the plaintiff, after lodging a caveat, to take prompt action against any person unless there is an endeavor to affect his right prejudicially. In support of his contention the learned counsel cited the Australian case of *Butler v. Fairclough & Anor* [1917] 23 CLR 78 where Grifit CJ said at p. 85:

> In my opinion the object of the provisions was to give a permanent protection to such an equitable owner, subject only to the condition that he should take prompt action against any person who endeavoured to affect his rights prejudicially.

The learned counsel also referred to a New Zealand case of *Holt v. Anchorage Management Ltd* [1987] 1 NZLR 108 where McMullin J referred to a passage in Baalman, *The Torren System in New South Wales* (2nd edn 1974 p. 300) which read as follows:

> Nor is it necessary that a caveator should anticipate legal proceedings. It is quite competent, for example, for the lessee under an unregistered term of years to lodge a caveat in the expectation that it will enable him to enjoy the term until it expires.

The learned counsel also contended that to date there is no evidence to show that the first defendant as the registered owner has endeavoured to effect the plaintiff's right prejudicially. The demand for the withdrawal of the caveat was only made by Unibor, the holder of the power of attorney who has no *locus standi* to initiate proceedings for the removal of the plaintiff's caveat.

I am satisfied that there is no evidence whatsoever to suggest that the first defendant has in any way endeavoured to effect prejudicially the right of the plaintiff under the said trust deed. It is clear that the first defendant had in fact confirmed the plaintiff's right under the trust deed and undertook to honour its obligation thereunder. It is also clear that the objection for the caveat to remain in the register did not come from the first defendant itself but from the holder of the power of attorney given by the first defendant pursuant to a development agreement entered between the first defendant and Unibor in 1984. The affidavits opposing this application were also not made for and on behalf the first defendant who is the registered owner of the land but were made for and on behalf of Unibor as the holder of the power of attorney thereof. The vesting of a property in the donee does not signify that the donor has divested himself of the title to his property and transferred the same to the donee (*Wee Tiang Peck v. Teoh Poh Tin* [1955] 1 MLJ 446). A power of attorney would not give an interest in land and that it is not truly a registered instrument conferring an estate or interest. It necessarily follows in my view that Unibor is not one of such persons who can apply for the removal of a caveat under s. 177 of the Land Code, or to oppose an application for an order under s. 178 thereof pursuant to a notice for its removal thereunder.

Taking all the circumstances into consideration, in order to preserve the *status quo*, I made the order as prayed for in the originating motion with no order as to cost. Provided that the order is conditional upon the plaintiff instituting, if he has not done so, an action against the appropriate party or parties for the enforcement of such right by which he considers himself entitled to within one month from the date of this order, failing which this application shall be dismissed with costs.